IN THE MATTER OF A BOARD OF INQUIRY

under the

H U M A N R I G H T S C O D E

Revised Statutes of Ontario, 1990, Chapter H.19

BETWEEN:

CHRISTINE CROZIER

Complainant

- and -

MURRAY ASSELSTINE, also known as MURRAY WILSON

Respondent

Board of Inquiry: Bernard Adell

Date of Appointment of Board of Inquiry: June 16, 1994

Date of Hearing:
July 14, 1994 (Conference Call)
September 20, 1994 (Kingston, Ontario)

Date of Decision:
October 3, 1994

Appearances:

For the Ontario Human Rights Commission
Anthony Griffin, Counsel
Peggy Smith, Student-at-Law

For the Respondent
Murray Wilson, on his own behalf

D E C I S I O N O F B O A R D O F I N Q U I R Y

The complainant alleges that the respondent, who was her employer, sexually harassed her in the workplace and also discriminated against her in her employment because of her sexual orientation. The only remedy asked for is general damages.

THE FACTS

Prior to the events which led to this complaint, the complainant, who was about 26 years old at the time, had been working at a Tim Horton's restaurant in Kingston as a coffee server. She heard that part-time work as a short-order cook was available in the restaurant at the nearby Rest Inn. The respondent was the operator of that restaurant, which appears to have been run separately from the rest of the hotel. He interviewed the complainant, and hired her. She started work on or about August 30, 1991. Her main responsibility was to prepare breakfasts, and she was apparently also on duty at lunchtime.

The complainant did not work for the respondent for long. At the start of the day on September 6, 1991, which would have been about her sixth day on the job, she quit. She did so by handing the respondent a three-page printed letter of resignation, which was dated September 5, 1991,

and which began as follows:

> Murray:
>
> This letter is to notify you that I no longer wish to be employed in the kitchen.
>
> I believe, that under normal circumstances, I am obliged to give my employer two weeks notice, but the situation under which I find myself is by no means normal. You have overstepped the employer-employee boundaries.
>
> In order to clarify my position in this matter, the following are my reasonings for no longer wanting to be employed by you.

After setting out a few paragraphs, mostly from a publication on the Human Rights Code, on the meaning of sexual harassment and sexual discrimination under the Code, the letter went on as follows:

> (i) The second day of my employment (Saturday, August 31, 1991) you asked me what I did for excitement, and I told you that I liked to dance. You then proceeded to ask me out, and when I informed you that I was involved with someone for the past three years, you were concerned whether or not my boyfriend was big and mean. You once again asked me not to disclose anything we had spoken about.
>
> (ii) On the third day of my employment (Sunday, September 1, 1991), you asked me whether or not I always told white lies. When I stated that I did not, you said that you were not stupid. I asked you what you meant by that, and you smiled. I then told you that I believed that my sexual orientation did not have any bearing on my employment there, and that I didn't want to cause waves.
>
> You then asked me if we could talk about it further. I said sure, and when we spoke briefly

about it, you persisted in questioning me extensively regarding the reasoning behind my sexual preferences and disclosed to me that you were no longer married, and liked to see other women besides the woman with whom I understood you are committed to. You also proceeded to tell me that you are "a horny man" and that the other woman who works alongside me that day was making you anxious and frustrated. I expressed my feelings of uncomfortability and stated that I no longer wanted to continue the conversation.

Shortly after this conversation, you proceeded to show me the catering facilities downstairs and said: "you never know what could happen if we were down here by ourselves, and that you were glad that I had a good sense of humour." I was startled by your comment. The bartender then came downstairs to inquire about a group function, thus ending our conversation. Once upstairs, you asked me if I would like to be your partner in your catering business. I said no, and you proceeded to ask me if I had any money. I inquired about the amount and you estimated $25,000. I told you I was a student and that it would be impossible for me to have that kind of money. You then asked me if my mother had any money? When my partner, Judy came to pick me up, you acted like a perfect gentleman and state: "we can discuss this later."

(iii) Monday, September 2, 1991, you called me at home asking if we could further discuss my sexual orientation. You inquired if my answering machine was one which had an intercom feature on it and I said no. After that you called several times and would not leave messages on the machine.

(iv) Tuesday, September 3, 1991, you called in the morning and asked Judy if I was home. She said yes, but that I was getting ready for school. You asked her to get me to call you at the restaurant. I was feeling pressured and violated by you and I decided to discuss the matter with my partner, Judy. I also confided in a few of my "trusted friends" as well as my brother. They assured me that my feelings were well-founded and that I was definitely not over-reacting. I decided at that point that I would cease working

as your employee.

> I have contacted the Human Rights Commission and they assure me that I have justifiable grounds with which to press charges. I have also contacted Gill, your employer, to make him aware of your misconduct towards me.
>
> Henceforth you have no justifiable reason to contact me either by phone, or at my home. I will have no recourse but to charge you with further harassment or with trespassing.

The complainant was a student at a community college at the time of the events in question. As soon as the Tim Horton's where she had previously worked had an opening with hours which suited her schedule, she went back to work there. As a result, no damages for lost wages, or any other specific damages, are being claimed on her behalf.

The respondent represented himself at the hearing, and was his only witness. He had difficulty in presenting his evidence clearly, in cross-examining the witnesses called by Commission counsel, and in presenting argument. Nevertheless, the evidence as a whole paints a fairly clear picture of the relevant events -- one quite similar to the account in the complainant's letter of September 5, 1991, as quoted above. My only reservation about the specific contents of that letter is that there is little evidence that several "hangup" calls recorded on the complainant's answering machine were calls from the respondent, as is alleged in para. (ii) of the letter. A significant point

which is perhaps implicit in the letter, and which the complainant confirmed in her testimony, is that at no time did the respondent touch her.

SEXUAL HARASSMENT

Section 7(2) of the Code provides that "Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer...." There are three elements of "harassment," according to the definition of that term in s. 10(1) of the Code. There must be "a course of ... comment or conduct", it must be "vexatious", and the respondent must have known, or should reasonably have known, that it was "unwelcome". On the evidence before me, all of the elements necessary to establish sexual harassment are present in this case. There were a number of comments of a sexual nature, and they were clearly vexatious to the complainant. They were made from time to time over a period of a few days, so they clearly amounted to a course of conduct. Once the complainant had told the respondent, in response to his first overture on her second day at work, that she had no interest in going out with him, he probably knew that further overtures or comments were unwelcome. If he did not know it at that time, he certainly did (or at least should have) by the end

of their conversation the next day on her sexual preferences and his sexual frustrations.

I am satisfied that the five or six instances of sexually related conversation initiated by the respondent during the time the complainant worked for him constituted sexual harassment in breach of the Human Rights Code. As I will explain below, it was not as severe a course of sexual harassment as is usually recounted in published board of inquiry decisions on this subject, but it was sexual harassment nonetheless.

DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION

The complaint alleges that the respondent also harassed the complainant because of her sexual orientation, and that such harassment constituted discrimination against her on the basis of sexual orientation. Section 5(1) of the Code says that "Every person has a right to equal treatment with respect to employment without discrimination because of ... sexual orientation...." In Janzen v. Platy Enterprises Ltd. [1989] 1 SCR 1252, the Supreme Court of Canada held that sexual harassment was a form of sex discrimination, and that in a jurisdiction (Manitoba) where human rights legislation prohibited sexual discrimination but did not mention sexual harassment, such harassment was a breach of

the prohibition against sex discrimination. Applying that reasoning here, harassment because of sexual orientation is a form of discrimination on the basis of sexual orientation.

Was the respondent guilty of harassment of the complainant because of her sexual orientation -- that is, because she was a lesbian? After she turned down his request for a date on her second day at work, he appears to have made no further requests of that sort, but he clearly continued to try to establish a sexual link with her. When he discovered or confirmed that she was a lesbian and was in a lesbian relationship, he appears to have decided to make an effort to persuade her of the advantages of having a heterosexual relationship with him. He testified that his purpose in telephoning her at home was to tell her that the message on her answering machine, which he felt was designed to disguise the absence of a man in the house, was bizarre and ineffective. Even if that was his real objective, which I doubt, I think the call or calls in question still formed part of the course of sexual harassment. So did his comments and queries at work with respect to the complainant's lesbianism and his supposed insight into her problems.

The respondent testified that he had a history of supporting homosexuals against mistreatment, that he had no

animosity toward lesbians, and that he was not a sexual predator. All of that may be true. Nevertheless, as I have said above, I think he decided (consciously or otherwise) to pursue his goal of a sexual relationship with the complainant by trying to convince her that there were problems with her current sex life. It could be argued that his actions to that end were simply part of a course of sexual harassment, rather than harassment or discrimination on the basis of sexual orientation. However, I do not think that would be a tenable argument. Imagine a hypothetical case where the complainant and the respondent are of different races, and the respondent pursues his goal of a sexual relationship with the complainant by trying to persuade her that people of her race enjoy and benefit from having sex with people of his race. That would clearly constitute racial harassment as well as sexual harassment. Similarly, in the case now before me, the respondent's conduct amounts to harassment because of sexual orientation as well as sexual harassment. On the reasoning of the Supreme Court of Canada in the Janzen case, referred to above, harassment for sexual orientation equals discrimination for sexual orientation, so the respondent was guilty of such discrimination.

THE APPROPRIATE REMEDY

Boards of inquiry have often held that an infringement of the statutory right against prohibited forms of discrimination should be compensated for by an award of general damages, under the power in s. 41(1)(b) of the Human Rights Code to "direct the party [in breach] to make restitution, including monetary compensation, for loss arising out of the infringement...." To assess that loss, I have to assess the effect of the respondent's conduct on the complainant.

Commission counsel argued, to use his exact words, that I should not second-guess the complainant about her feelings. If this argument means (as I think it does) that the complainant is in a better position than anyone else to testify to the impact of the respondent's conduct on her, I agree with it. But if it means that the complainant's testimony on that matter should be treated as exempt from scrutiny on how well it fits with the rest of the evidence, I cannot accept it. Any relevant assertion by any witness is open to disproof or qualification by other evidence.

The complainant testified that she was upset by what the respondent said to her at the time he said it, and was still upset by it at the time of the hearing -- a claim which is supported by the fact that at one point in her

testimony, she was very close to tears. Her partner, Judy Dupuis, testified that the complainant seemed distressed one day when Ms. Dupuis picked her up after work at the Rest Inn, and that despite an initial reluctance to talk about it, she soon explained that the respondent's behaviour was responsible for her unease. Ms. Dupuis also testified that the complainant later expressed concern that she might run into the respondent again somewhere after leaving his employ, and that she has always had trouble talking about the events in question without getting emotional. Evelyn King, who knew the complainant quite well and who worked at the front desk of the Rest Inn during the period in question, also testified that the complainant appeared to be upset while she was working for the respondent. On the other hand, the complainant acknowledged that after quitting her job with the respondent, she did not feel the need to seek medical help or other professional counselling, and that she was able to carry on with her normal activities -- a point which was confirmed by Ms. Dupuis.

The complainant's final encounter with the respondent on September 6, 1991, when she handed him her letter of resignation immediately after coming into the restaurant, is of some relevance to an assessment of the impact of his behaviour on her. In her words, when he had read some or

all of that letter, he said, "Oh no!" Her reply was, "Oh yes!" The respondent, she said, then became apologetic, asking if there was anything he could do. Her response was, "Save it." The respondent again expressed his apologies, and the complainant left. Ms. King confirmed that the respondent came over to the front desk shortly afterward, and told her that he thought he had hurt the complainant and "did not know how to make it better."

I accept Commission counsel's point that the respondent's repeated apologies at that point indicate a consciousness of guilt on his part, and therefore support the complainant's allegations as to what he had said earlier -- allegations which, as I have concluded above, are well founded. But the respondent's explicit acknowledgement to the complainant that he had acted wrongly, and his apologies for having done so, cannot be ignored in weighing the longer-term impact of his actions on her. The point is not that an apology lessens the intrinsic blameworthiness of conduct which violates the Human Rights Code, but that the resulting injury to the victim's dignity and self-esteem is likely to be more severe and longer lasting if the violation remains unacknowledged and unregretted. At the very least, an explicit and more or less voluntary apology, which is what the respondent appears to have offered at the time of

the complainant's resignation, could be expected to lessen the victim's fears that the harasser will continue to pursue her after she has broken off contact with him -- at least in a situation where, as here, the course of harassment was relatively brief and did not include any violence or any threats.

A helpful and often-cited list of criteria to consider in assessing general damages for sexual harassment is set out in Torres v. Royalty Kitchenware Ltd. (1982) 3 CHRR D/858 (Cumming), at para. 7758:

> (i) The nature of the harassment, that is, was it simply verbal or was it physical as well?
> (ii) The degree of aggressiveness and physical contact in the harassment;
> (iii) The ongoing nature, that is, the time period of the harassment;
> (iv) The frequency of the harassment;
> (v) The age of the victim;
> (vi) The vulnerability of the victim; and
> (vii) The psychological impact of the harassment upon the victim.

In the case at hand, the harassment was entirely verbal, with no physical contact and no allegation that the respondent ever spoke to the complainant in an aggressive manner. The harassment lasted until the end of the employment relationship, but that was only a few days long, and there was no allegation that the harassment continued after the complainant resigned. The complainant

was fairly young -- about 26 years old -- but unlike the complainants in many sexual harassment cases, she was not a teenager, nor was she working at her very first job. As for her vulnerability, it was undoubtedly increased by the fact that as a lesbian, she was a member of a marginalized group. On the other hand, she quickly found out where to turn for help, and her capacity to stand up for herself is shown by the fact that after only a few days on the job she was able to present the respondent with an articulate, strongly written resignation letter setting out in detail her allegations against him. Finally, as noted above, the fact that her mistreatment by the respondent did not lead her to seek medical help or other professional counselling, or cause any interruption in her ability to continue her regular activities, supports an inference that its psychological impact on her was rather limited. On the whole, then, the Torres criteria point quite clearly toward only a modest amount of general damages in this case.

I will now turn to some post-Torres decisions for more recent guidance on what that amount should be. Some of the jurisprudence is gathered and commented on by Josée Bouchard in her article, "Les mesures de redressment pour les victimes de harcèlement sexuel: le Code des droits de la personne de l'Ontario," (1994) 19 Queen's Law Journal (no.

2) 551, at pp. 561-78.

As noted above, the case before me involves an element of discrimination because of sexual orientation as well an an element of sexual harassment. For that reason, a particularly helpful parallel is provided by Cuff v. Gypsy Restaurant, (1987) 8 CHRR D/3972 (Bayefsky), where the sexual harassment was aggravated by a significant racial element. The complainant was a 22-year-old black woman who worked for the respondent for about six months as a part-time waitress. During that entire period, he subjected her to a continual stream of highly obscene sexual comments, sexual groping, and sexual propositions, and he fired her when she threatened to tell his wife what was going on. He made a number of very derogatory references to her race, and he told her that black people especially liked to perform a certain sex act which he tried to cajole her into performing on him. His racially and sexually abusive comments about the complainant apparently continued throughout the proceedings under the Code. The adjudicator found that the application of the first six Torres criteria all pointed toward substantial general damages; only the apparent absence of lasting psychological harm pointed the other way. She awarded general damages of $2,000.

Noffke v. McClaskin Hot House, (1990) 11 CHRR D/407

(Zemans), cited by Commission counsel, involved a young complainant in her first job after high school. During the approximately two months of her employment with the respondent, he repeatedly touched her in a grossly sexual way, made frequent obscene comments to her, and persistently propositioned her. Finally, he ended her employment prematurely because she rejected his advances. After applying the Torres criteria, the adjudicator concluded (at para. 49) that "[t]his harassment was particularly difficult for a young woman in her first employment, creating anxiety and distress both while employed by the respondent and for a period of time after she left the respondent's employ." He awarded $2,750 in general damages.

In the recently reported case of Bruce and Jackson v. McGuire Truck Stop, (1993) 20 CHRR D/145 (Mendes), the two complainants, who were only 15 years old, were hired as waitresses. Their employer repeatedly touched them sexually, persistently made sexual comments and innuendoes, and tried to make them watch a pornographic movie in the kitchen. One complainant quit after two days on the job, and the other after two weeks. Both pressed criminal charges against the employer, who was convicted on three counts of sexual exploitation under the Criminal Code. In applying the Torres factors, the adjudicator said (at para.

40) that the employer's behaviour "was aggressive and involved persistent and frequent unwelcome physical contact with the complainants over relatively short periods of time," and that "the exposure of pornographic material in the workplace is an aggressive form of sexual harassment." He added (also at para. 40) that the the complainants' mental anguish was aggravated by their young age and perhaps also by the fact that in the very small community where they lived, "there are greater obstacles to be faced in mitigating losses and coming forward with the human rights complaints." Each complainant was awarded general damages of $2,500.

The breaches of the Human Rights Code in each of the three cases just referred to, all of which were Ontario cases, were clearly far more severe than those in the case now before me, on almost all of the Torres criteria. The duration of the harassment was much longer in every case except Bruce and Jackson, but the extremely young age of the the complainants added significantly to the seriousness of the breaches in that case. In each of the cases cited, there was persistent sexual touching, some of it quite aggressive, and in Cuff and Noffke there were persistent obscene comments and direct sexual propositions. The respondent in the case at hand was substantially less

aggressive; he did not touch the complainant, he did not directly proposition her, and as distressing as his verbal harassment may have been, it did not descend to anything like the levels of obscenity reached in all three of those cases. It is true that there was a double breach of the Code here, as discrimination for sexual orientation was intertwined with sexual harassment. However, there was also a double breach in Cuff, where the sexual harassment was accompanied by severe and extremely demeaning racial harassment.

Two recently reported decisions of the Quebec Tribunal des droits de la personne make awards of general damages for sexual harassment which appear to be somewhat higher than those in Ontario. In Roy v. Larouche, (1993) 20 CHRR D/1 (Rouleau J.), during the three to four-month period of employment of the complainant, who was a 21-year-old secretary, the respondent employer repeatedly touched her, made sexual comments and unwanted professions of love to her, and often telephoned her at home to press his attentions on her. He also made a point of rewarding her openly in front of other employees because of her appearance and manner of dress. In what the tribunal (at para. 10) called "the culminating incident," he gained entry to her home one morning on a pretext, and tried to persuade her

to undress and go to her bedroom with him. When she told him to leave, he made an obscene comment about his state of sexual arousal, and a remark to the effect that he might rape her. The tribunal (at para. 48) described that incident as "constituting in itself a serious form of sexual harassment" (my translation). The severity of the harassment was aggravated, the tribunal said (at para. 55), by the respondent's "serious invasion of the complainant's private life" (my translation). General damages of $6,000 were awarded.

In Gervais v. Vaillancourt, (1993) 20 CHRR D/7 (Quebec Tribunal des droits de la personne, per Rouleau J.), the complainant, a woman 37 years of age worked for about eight months in a clerical position under the respondent's immediate supervision. The respondent often touched her, made comments on her physical attributes, gave her an inappropriate gift, and made off-colour jokes and remarks to her. She considered resigning because of his conduct. However, as a result of her complaints to higher management and those of other female employees, he was fired, and she was promoted to fill his position. The tribunal awarded her general damages of $3,000.

Although I do not agree with everything that Professor Bouchard says in her recent article referred to above, I

think there is some merit in her conclusion (at p. 581) that "damages for non-pecuniary loss should be increased" in sexual harassment cases under the Ontario Human Rights Code (my translation). Even leaving inflation aside, the awards of between $2,000 and $3,000 for the very severe breaches in the Cuff, Noffke, and Bruce and Jackson cases may indeed not have been enough to compensate for such flagrant affronts to the dignity and fundamental human rights of the complainants. The award of $6,000 in the Roy case appears to me to be at a level more appropriate to the serious sexual harassment and serious invasion of privacy in that case. However, on the reported facts of the other Quebec case referred to above (the Gervais case), I would have reservations about an award as high as $3,000.

In sum, on the Torres criteria, which have often been used by boards of inquiry to summarize the range of considerations in assessing general damages in sexual harassment cases under the Ontario Human Rights Code, the circumstances in the case at hand point clearly to only a modest award of general damages. As I have said above, I accept that the element of harassment for sexual orientation adds weight to the sexual harassment committed by the respondent. However, the violations of the two provisions of the Code are closely intertwined, and neither one doubles

the effect of the other. For the reasons I have given above in discussing the application of the Torres criteria to the facts at hand, I think the overall severity of the violations, and the effect which the evidence indicates that they had on the complainant, was less than in any of the cases I have cited, and a great deal less than in any of them except possibly Gervais v. Vaillancourt. I therefore cannot agree with Commission counsel's submission that it would be appropriate to award $2,000 for sexual harassment and a further $2,000 for discrimination on the basis of sexual orientation. In my view, an appropriate amount of general damages in the circumstances of this case is $1,500 in total.

Commission counsel asked for interest from the date of the complaint to the date of this decision. However, as has been noted in several board of inquiry decisions, general damages compensate for the effect of the breach not only before the bringing of the complaint but afterwards as well, and an award of interest is therefore inappropriate.

ORDER

I find that the respondent sexually harassed the complainant in the workplace, in breach of s. 7(2) of the Ontario Human Rights Code, and that he discriminated agaist

her in respect of her employment because of sexual orientation, in breach of s. 5(1) of the Code.

The respondent is ordered to pay the complainant the sum of $1,500.00 in general damages, under s 41(1) of the Code.

Bernard Adell
Board of Inquiry
October 3, 1994